United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w affidavit of mailing

75-1116

To be argued by
STEVEN KIMELMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1116

UNITED STATES OF AMERICA,

Appellee,

—against—

MICHOEL ZILBERBERG,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
STEVEN KIMELMAN,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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Preliminary Statement

Michoel Zilberberg appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (Neaher, *J.*) entered on March 14, 1975. Appellant was convicted after a jury trial, on seven counts of mail fraud in violation of Title 18, United States Code, Section 1341 and seven counts of using a fictitious name during the execution of the aforesaid fraudulent scheme in violation of Title 18, United States Code, Section 1342. Appellant was sentenced to a total of one year imprisonment on his conviction for the seven counts involving Section 1342 and a total of three years probation for his conviction under Section 1341. Appellant is currently free on bail pending the outcome of this appeal.

On this appeal, appellant raises four contentions. First, appellant alleges that the trial court "permitted the amend-

ment of the indictment" without appellant's consent. Second, appellant believes that the district court should have declared a mistrial because Government counsel asked a witness if appellant had been involved in a "criminal proceeding". Third, appellant maintains that the court's charge as to "intent" was insufficient. Fourth and finally, appellant claims that the Government introduced several exhibits which were without relevance to him.

Statement of Facts

Between April 1971 and January 1972, one "Charles Ross" applied for and received credit cards from eight companies as follows:

(1) An application (51, Gov't Exhibit 6, App. A-2) was mailed to American Airlines on or about August 2, 1971.* Based on this application, a credit card was mailed on August 23, 1971 (52).

(2) An application (69, Gov't Exhibit 9, App. A-3) was received by Chevron Oil Company on September 1971. Based on this application, a credit card was mailed on September 23, 1971 (70-71).

(3) An application (80-81, Gov't Exhibit 11, App. A-4) was received by Diners Club on December 27, 1971. Based on this application, a credit card was mailed on January 24, 1972 (82).

(4) An application (92-93, Gov't Exhibit 13, App. A-5) was mailed to Gulf Oil on or about April 20, 1971. Based

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* Page references in parenthesis refer to pages in the transcript of trial. "App." refers to the Government's Appendix. Gov't Exhibits 4, 6, 9, 11, 13, 17, 19, 21, 25A, 33, 34 and 37 are reproduced in the Government's Appendix. Gov't Exhibits 15, 31 and 32 could not be reproduced but will be available at the oral argument.

on this application, two credit cards were mailed on May 26, 1971 (94).

(5) An application (112, Gov't Exhibit 15) was mailed on August 19, 1971. Based on this application, two credit cards were mailed on August 19, 1971 (113).

(6) An application (131, Gov't Exhibit 19 App. A-9) was mailed to Manufacturer's Hanover Trust Master Charge on April 13, 1971. Based on this application, two credit cards were delivered in May 1971 (132).

(7) An application (214, Gov't Exhibit 31) was mailed to Bankers Trust BankAmericard in August 1971. Based on this application, a credit card was mailed in August 1971 (215-216, 218).

(8) An application (255, Gov't Exhibit 33, App. A-15) was mailed to Getty Oil in August 1971 (255). Based on this application, a card was mailed in September 1971 (25).*

Between April 1971 and December 1972, "Charles Ross" using the aforementioned credit cards incurred the following charges and made the following payments:

(1) American Airlines—$1,282.16 in charges. Outstanding balance**—$1,282.16 (56-57).

(2) Chevron Oil—$295.97 in charges. Outstanding balance—$295.97 (72-73).

(3) Diners Club—$3,716.13 in charges. Outstanding balance—$3,618.00 (84-85).

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* Although the counts in the indictment relating to this application (counts 6 and 18) (Appellant's Appendix 2a and 5a) were dismissed at the Government's request prior to trial, evidence of this application was offered as a similar act.

** As of the week of trial.

(4) Gulf Oil—$1,118.74 in charges. Outstanding balance—$893.40 (96-97).

(5) Mobil Oil—$563.01 in charges. Outstanding balance—$563.01 (112-115).

(6) Manufacturer's Hanover Trust Master Charge $970.19 in charges. Outstanding balance—$870.19 (137-138).

(7) Bankers Trust BankAmericard—no evidence was adduced as to charges incurred.

(8) Getty Oil—$1,058.17 (253, 259-264) in charges. Outstanding balance of $845.65 (253).

Handwriting analysis conclusively showed that appellant was the author of several of the "Charles Ross" applications (197-200). In addition, appellant's counsel conceded throughout his summation that appellant had used the name "Charles Ross" in all of the credit card applications in evidence (302-322).

On three "Charles Ross" applications, the name "Al Gordon" appears as a reference for "Charles Ross". First, the application for a Manufacturers Hanover Trust Master Charge card (Gov't Exhibit 19; App. A-9) lists "Al Gordon" as "Charles Ross'" nearest relative or friend.* When Manufacturers Hanover Trust Master Charge employees attempted to locate "Charles Ross" to obtain payment of charges incurred, someone at the Em-Ze Trucking Company told them that "Charles Ross" was no longer employed there (169-170) and "Al Gordon" told them that "Charles

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* Verification of "Charles Ross" employment as manager of Em-Ze Trucking Company on this very application was made in writing by "Michoel Zilberberg, President" (139-141), Gov't Exhibit 21; App. A-11). In fact, in each application in evidence, "Charles Ross" listed his occupation as manager of the Em-Ze Trucking Company.

Ross" has moved away (170-171; Gov't Exhibit 25a; App. A-13). Second, on his application for a Banker's Trust BankAmericard, "Charles Ross" stated that "Al Gordon" was his landlord (213; Gov't Exhibit 31) and when BankAmericard verified "Charles Ross" employment at Em-Ze Trucking Co., the verification was signed by "Al Gordon—Personnel" (213-214; Gov't Exhibit 32). Third, a verification letter was also sent in connection with "Charles Ross" application for Getty Oil credit card (255-266; Gov't Exhibit 34; App. A-17). Again "Al Gordon" verified that "Charles Ross" was the manager of Em-Ze Trucking Co. and that he had a good reputation for "honest dealing" (257). Proof was also offered that both "Al Gordon" and "Charles Ross" had Mobil Oil credit cards at about the same time.*

Handwriting analysis again conclusively demonstrated that "Charles Ross", "Al Gordon" and appellant Michoel Zilberberg were one and the same individual (197-200).

In six of the eight credit card accounts opened by "Charles Ross", the company involved eventually turned the account over to a collection agency. Not a single collection agency was ever able to find and contact "Charles Ross" based on the information supplied in his application (57, 85, 97, 116, 138, 258). Moreover, as noted previously, "Al Gordon" made certain that "Charles Ross" would not be found (170-171, Gov't Exhibit 25a; App. A-13). The Government also offered evidence that both

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* Both the "Charles Ross" and "Al Gordon" applications for a Mobil credit card list the applicant as "Traffic Manager" of Em-Ze Trucking Company (112, 123). A further comparison of the two applications, however, shows that "Charles Ross" and "Al Gordon" lived at different addresses, had different wives and different social security numbers (Gov't Exhibits 15 and 17; App. A-7).

"Charles Ross" and "Al Gordon" obtained post office boxes in April of 1972 * (14, 34). Shortly after these boxes were obtained, all mail for both "Charles Ross" and "Al Gordon" were sent to the post office boxes instead of the home addresses at the applicants' requests (20-21, 40-41).

Finally, Barry Ash, a vice president of the County Trust Company in Somerset, Pennsylvania made an in court identification of appellant as a bank customer that he knew as "Charles Ross" (279). Ash testified that on several occasions in 1972, "Charles Ross" checks drawn on his bank had been returned for insufficient funds (277-278). Moreover, in August of 1972, as repayment for a loan, the County Trust Company received a check in the amount of $759.20 drawn to the account of Charles Ross on the Chelsea National Bank in New York City. This check was also returned for insufficient funds (278-281).**

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* The "Charles Ross" application for a post office box gave a home address of 1527 45th Street, Brooklyn, New York (17). This address was verified by a New York State driver's license in the name of "Charles Ross" (18). A stipulation (Gov't Exhibit 37; App. A-18) was entered, however, that 1527 45th Street was the home of appellant's brother-in-law during the time in question. The application for "Al Gordon" lists a home address of 1470 57th Street, Brooklyn, New York (40).

** It should be noted that this particular account at the Chelsea National Bank had been used as a bank reference in most of the "Charles Ross" applications for credit cards (A-2, A-3, A-4, A-5, A-9, A-15).

ARGUMENT

POINT I

The variance in paragraph three of the indictment is not fatal.

There is no question that there was a variance between the allegations set forth in paragraph 3 of the indictment and the proof adduced at trial. The Government elicited from its own witnesses that two post office boxes rented in the names of "Charles Ross" and "Al Gordon" were not obtained until April 1972 (14, 34); several months *after* the receipt of the last credit card in January 1972 (82). The post office box under the name of "Charles Ross" concededly could not have been rented for the purpose of receiving the credit cards in question. Evidence of the rentals of boxes and the subsequent filing of change of address of forms by "Charles Ross" and "Al Gordon" was offered solely to show appellant's intent to defraud. The Government argued that appellant took out these post office boxes to make it more difficult for the defrauded companies to find him (332-333).

In any event, the contention in appellant's brief (Appellant's Brief 12) that the trial court "amended" the indictment is a complete misstatement of the record. On the contrary, after several lengthy discussions of the variance (46-48, 63-65, 235-244), the court clearly stated it would not permit the amendment of the indictment (239, 243). Rather, it informed appellant's counsel that he could argue to the jury the Government's failure of proof on this point (239) and appellant's counsel did exactly that on his summation (319-320).

Because the contention in Point I of appellant's brief cannot be taken literally, it must be treated as charging error in the district court's failure to dismiss the indict-

ment because of the variance. The classic test of whether a variance shall be deemed fatal is stated in *Berger* v. *United States*, 295 U.S. 78, 82 (1935) as follows:

> "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. (Citations omitted.)

See also *United States* v. *D'Anna*, 450 F.2d 1201, 1204 (2d Cir. 1971); *United States* v. *Gross*, 416 F.2d 1205, 1213 (8th Cir.), *cert. denied*, 397 U.S. 1013 (1969); *United States* v. *Houlihan*, 332 F.2d 8 (2d Cir.), *cert. denied*, 379 U.S. 828 (1964).

An examination of the trial record fails to bring to light any showing of prejudice to appellant as required by *Berger*. Indeed, in this case, where appellant knew early in the trial of the mistake in the indictment and where the allegations were unnecessary to sustain the indictment, no claim of prejudice is made at all. As such, appellant's contention in Point I is without merit.

POINT II

The question asked by Government counsel did not prejudice appellant's right to a fair trial.

As set forth in appellant's brief (Appellant's Brief, 16-17), Government counsel took the precautionary and reasonable step of making an offer of proof as to the testimony of the witness Barry Ash (246, 248-250). It was, in fact, clearly stated by the Assistant U.S. Attorney that he had instructed the witness not to mention that appellant had been arrested in Pennsylvania for passing a bad check to the witness' bank (249). The direct examination of the witness proceeded according to the side bar discussion. Government counsel simply elicited that a check drawn on Charles Ross' account with the Chelsea National Bank had been returned for insufficient funds (281). On re-cross examination by appellant's counsel. However, the following dialogue occurred:

> Q. [By Mr. Lazarus] Mr. Ash, that check that you characterized as unusual in connection with that loan from Chelsea National Bank, was that money subsequently made good? A. Yes it was.
>
> Mr. Kimelman May we have a side bar?
>
> The Court: You may ask a question.
>
> Mr. Kimelman: Very good.

Redirect Examination by Mr. Kimelman:

> Q. Tell us the circumstances under which that check was made good.
>
> Mr. Lazarus: I'll object to that. A. The fact that it was made good——
>
> The Court: I think you opened the door to that.

Mr. Lazarus: That's not a question of opening the door. That was a question that was asked on direct examination about whether there was something unusual and whether there was a check. I asked, was that check subsequently made good?

The Court: I'm allowing it to find out the circumstances.

Q. You may answer. A. The check, as I stated before, came back for insufficient funds. In other words, there wasn't enough money in Chelsea Bank to cover the check. At that point—I first of all contacted Mordicai Zilberberg by letter that the check was returned, and I instructed him that he had ten days to honor the check to make it good at which point nothing had been done, so the check was issued on August 22. On November 10 of 1972 I turned the check over, it still hadn't been made good.

I turned it over to my attorney, the bank's attorney and they—or he rather, filed a civil suit at which time Mr. Ross, Charles was called to a hearing and at the hearing Mr. Ross made the check good.

Q. Was this a criminal proceeding?

Mr. Lazarus: I'll object to the form of that. I move for a mistrial (286-288).

It is obvious from the above colloquy that Government counsel sought a second side bar to determine how far he could proceed through the "open door" (287). The trial court denied the side bar and advised the Assistant U.S. Attorney to proceed with his redirect examination. When Government counsel attempted to determine the circumstances under which the check was made good, the court directed the witness to answer over defense counsel's

objection (287). The witness Ash partially explained (as per his pre-trial preparation by Government counsel (249)) that appellant had been brought to a "hearing". Government counsel acting in the belief that the "full circumstances" were now admissable then asked if this "hearing" was a criminal proceeding.

There is simply no issue of fact that, in the context in which it happened, that this question was asked in good faith and without any attempt to unduly prejudice appellant (290). Indeed, the question was highly relevant in light of appellant's trial counsel leaving the jury with a false impression as to how the check was finally paid. Moreover, even if the question alone be deemed improper, the trial court immediately and in no uncertain terms admonished Government counsel and cautioned the jury to disregard the question (288). Finally, as part of its charge, the court stated that questions of counsel are not to be considered as evidence (339).

If there be any error in the phraseology of the one question complained of, it surely was of the harmless variety. Rule 52(a), Federal Rules of Criminal Procedure. The error was not repeated, and the curing instruction was prompt and strong. Since there was an abundance of evidence concerning appellant's guilt and the result would almost surely have been the same despite the solitary question, the asserted error, if any, should be disregarded. It is not unreasonable to assume that in this relatively simple case, the jury followed the court's instruction, *United States* v. *Catino,* 403 F.2d 491 (2d Cir.), *cert. denied,* 394 U.S. 1003 (1968), and that in the context asked this question was harmless.

POINT III

The trial court properly charged as to the element of intent.

Appellant contends that the trial court failed to properly charge as to the specific intent required for conviction under Section 1341. More particularly, appellant specifically requested (after the charge had been given) that the court "instruct the jury that the mailings must have been for the specific purpose of executing a fraud" (appellant's appendix, 31A). The court replied that it had already given the substance of that request in its original charge (appellant's appendix 31A-32A).

On appeal, appellant points to that passing exception to the court's charge and contends that the court failed to explain to the jury that the fraudulent intent had to precede the mailings. In our view, Judge Neaher adequately explained to the jury that the fraudulent intent had to be formed before the mailings. In addition, he was quite correct in assessing his charges as adequately meeting the objection made, in the trial court, by appellant's counsel.

A review of the entire charge as given supports the position of the trial court. First, the court explained to the jury that Sections 1341 and 1342 "were enacted by Congress to prevent the use of the U.S. Mail as a means of carrying out or even attempting to carry out fraudulent schemes or conduct fraudulent schemes" (appellant's appendix 12A). Second, the court set forth the three essential elements of the crime in abbreviated form (appellant's appendix 13A). After explaining the words "scheme", "artifice" and "defraud", the court charged that the scheme in question involved appellant's submission of credit card applications which contend false representations and with the intent of later using such credit cards for goods and services for which no payment was intended (appellant's

appendix 14A-15A). Fourth, the court fully charged as to each of the three essential elements in the exact manner generally regarded as sufficient and proper in mail fraud cases (appellant's appendix 16A-17A). (See Mathes & Devitt, *Federal Jury Practice and Instructions Section 35.05* (Supp. 1968).

Appellant's request that specific intent to defraud must exist at the time of the mailings in question was satisfied by the court's explanation of the three essential elements. Under the charge as given, the jury had to first find that the appellant, having already formed the intent to obtain goods and services without paying for them, submitted applications containing false representations as part of his scheme to obtain the eight credit cards in question. Only then could the jury consider whether appellant used the U.S. Mails for the specific intent of effectuating this scheme. Based on the facts of this case which undisputedly showed that appellant either mailed these false applications and/or received credit cards through the mail based on these false applications, the jury could reasonably find that appellant had used the mails to effectuate his scheme i.e. the use of fraudulent applications.

Finally, the court explained to the jury that they could determine specific intent by examining all the facts and circumstances surrounding appellant's conduct (appellant's appendix 17A-18A).

Upon review of the entire charge therefore, appellant's arguments are unsubstantied. His reliance upon *United States* v. *Maze*, 414 U.S. 395, (1974) is similarly misplaced. The facts of *Maze* are substantially distinguishable from the instant case. Unlike *Maze*, appellant's unlawful use of the mails was the sending of fraudulent applications. The Court clearly charged that the mailings in question required appellant's specific intent to carry out the scheme in question and, therefore, appellant's request to this end was merely superfluous and repetitive.

POINT IV

Government Exhibits thirty-one through thirty-four were properly admitted.

Appellant complains that the introduction of Government Exhibits 30-34 denied him the right to a fair trial because these exhibits were not "connected" to him. This contention is patently frivolous. Government's Exhibits 31 and 33 are applications in the name of "Charles Ross" for Bankers Trust BankAmericard and Getty Oil credit cards respectively. These applications contain almost the exact same information found on each of the other six "Charles Ross" applications in evidence. Moreover, appellant's trial counsel conceded in both his opening (7) and summation (302-322) that appellant had obtained all the credit cards in question under the name Charles Ross. In fact, appellant's counsel specifically commented on the fact that appellant had made several payments to Getty under the name of "Charles Ross" (310-312, 317). To contend that these exhibits (Govt. Exhibits 31 and 33) were not connected to the appellant simply ignores the record of the trial.

As to Government Exhibits 32 and 34 (App. A-17), these exhibits are "verification" letters sent by Bankers Trust BankAmericard and Getty Oil in connection with the applications (Gov't Exhibits 31 and 33 (App. A-15). The letters were sent to the employer listed for "Charles Ross", the Em-Ze Trucking Co. When the letters were returned to BankAmericard and Getty, confirming "Charles Ross'" employment, they were signed by "Al Gordon" of "Personel" (sic). As noted previously, appellant was positively identified through handwriting analysis (200) as using the name "Al Gordon" to obtain a post office box (34, Gov't Exhibit 4 (App. A-1)) as well as a Mobil Oil credit card (123, 124, Gov't Exhibit 17 (App. A-7)).

The application for the Mobil Credit card unsurprisingly enough stated that "Al Gordon" was the "manager" of the same Em-Ze Trucking Company.

Although Government Exhibits 31-34 are "connected" to appellant by circumstantial rather than direct evidence, it is evidence of an overwhelming nature. It is well settled that circumstantial evidence may be weighed by the jury in the same way as direct evidence. *Holland* v. *United States*, 348 U.S. 221 (1954). Appellant's contention that these exhibits were not relevant because of the Government's failure to connect them with appellant are simply beyond comprehension. *United States* v. *Messina*, 507 F.2d 73, 80 (2d Cir. 1974).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

May 28, 1975

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
STEVEN KIMELMAN,
Assistant United States Attorneys,
Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 30th day of May 19 75 he served ~~a~~ two copies copy of the within

Brief and Appendix for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

John J. Meglio, Esq.
555 Madison Avenue
New York, N. Y. 10022

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

30th day of May 19 75

Olga P. Morgan

OLGA P. MORGAN
Notary Public, State of New York
No. 24-6501966
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Commission Expires March 30, 1977